No. 08-730

# In the Supreme Court of the United States

AMERICAN BANKERS ASSOCIATION, ET AL.,
PETITIONERS

*v.*

EDMUND G. BROWN, JR., ATTORNEY GENERAL OF CALIFORNIA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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## QUESTION PRESENTED

The Fair Credit Reporting Act (FCRA), as amended, generally preserves state laws " with respect to the collection, distribution, or use of any information on consumers * * * except to the extent that those laws are inconsistent with [FCRA]." 15 U.S.C. 1681t(a). FCRA establishes various exceptions to that savings clause, however, including one that expressly preempts state laws that impose any "requirement or prohibition * * * with respect to the exchange of information among persons affiliated by common ownership or common corporate control." 15 U.S.C. 1681t(b) and (b)(2). The question presented in this case is as follows:

Whether FCRA preempts the California Financial Information Privacy Act, Cal. Fin. Code §§ 4050 *et seq.* (West Supp. 2009), to the extent the state law restricts the exchange among affiliated financial institutions of information on consumers.

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the Court should deny the petition for a writ of certiorari.

## STATEMENT

A. 1. The Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.*, establishes standards for businesses' collection, use, and exchange of information on consumers, including information collected or used to determine a consumer's eligibility for credit, employment, or insurance. FCRA heavily regulates entities that engage in the business of assembling and selling consumer information, called "consumer reporting agenc[ies]." 15 U.S.C. 1681a(f). A "consumer reporting agency" is an entity that regularly collects and dissemi-

nates "consumer reports," defined as "any written, oral, or other communication of any information * * * bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" that is used or collected at least in part for the purpose of evaluating the consumer's fitness for credit, insurance, or employment (among other specifically enumerated purposes). 15 U.S.C. 1681a(d)(1) (footnote omitted). Consumer reporting agencies must, *inter alia*, maintain procedures that ensure that they supply consumer reports only for lawful purposes and in a permissible format, 15 U.S.C. 1681e(a); that they protect information they possess about consumers from identity theft, 15 U.S.C. 1681c-2; and that they permit consumers to dispute inaccurate information that the agencies possess, 15 U.S.C. 1681i.[1]

As originally enacted, FCRA had the effect of discouraging financial institutions from sharing information about their customers (*e.g.*, the customer's account balance with the institution, or the customer's transaction history on a credit card issued by the institution) with their corporate affiliates. In one common situation, if an institution (Entity 1) provided its affiliate (Entity 2) with such information, and Entity 2 in turn shared that information with a third affiliated party (Entity 3) for the purpose of determining the consumer's eligibility for credit, insurance, or employment, Entity 2 could become a "consumer reporting agency" subject to perva-

[1] Consumer reporting agencies are not the only entities subject to FCRA. For example, FCRA forbids persons from knowingly supplying inaccurate information to these agencies, 15 U.S.C. 1681s-2(a)(1)(A); regulates the users of consumer reports, 15 U.S.C. 1681m; and prohibits merchants from printing more than a set number of digits on certain credit card receipts, 15 U.S.C. 1681c(g)(1).

sive regulation under FCRA. That potential existed because, although the original FCRA definition of "consumer report" expressly excluded so-called "transaction and experience information," the exclusion was limited to "report[s] containing information solely as to transactions or experiences between the consumer and *the person making the report*," Act of Oct. 26, 1970 (1970 Act), Pub. L. No. 91-508, § 601, 84 Stat. 1128 (emphasis added). Although that safe harbor would protect Entity 1 in the situation described above, it would not protect Entity 2, because Entity 2's report would describe the customer's transactions and experiences with a different (albeit affiliated) corporate entity. More generally, whenever a corporate entity shared with an affiliate any information falling within the definition of "consumer report" that did not concern transactions and experiences with its customers, the transferor of the information could become a "consumer reporting agency," and so subject to FCRA's extensive regulation.

2. In 1996, Congress expanded FCRA's safe harbor to help ensure that the transfer of consumer information to an affiliate would not transform an entity into a "consumer reporting agency." See S. Rep. No. 185, 104th Cong., 1st Sess. 19 (1995) (*Senate Report*) ("The affiliate sharing provisions * * * will allow affiliates to share such information without being deemed a consumer reporting agency."); see also Br. in Opp. 21-23. The amendments excluded two additional categories of information from the definition of "consumer report."

*First*, Congress addressed the specific situation described above by amending the definition of "consumer report" to exclude the communication of transaction and experience information "among persons related by common ownership or affiliated by corporate control."

Consumer Credit Reporting Reform Act of 1996 (1996 Amendments), Pub. L. No. 104-208, § 2402(e), 110 Stat. 3009-428 (15 U.S.C. 1681a(d)(2)(A)(ii)). *Second*, to address the more general situation described above, Congress provided that "any communication of other information among [affiliates]" will similarly be excluded from the definition of "consumer report" if the consumer is notified that the information may be shared, and is provided an opportunity to specify that the information should not be shared. § 2402(e), 110 Stat. 3009-428 (15 U.S.C. 1681a(d)(2)(A)(iii)). The practical effect of that amendment is that, so long as corporate entities comply with the notice-and-opt-out provision of the 1996 Amendments before sharing information with their financial affiliates, they need not make the sometimes-difficult determination whether information other than transaction and experience information might count as a "consumer report." See Pet. App. 4a.

The 1996 Amendments also contained an express preemption provision. Since 1970, FCRA and its predecessor have expressly preserved state laws "with respect to the collection, distribution, or use of any information on consumers, except to the extent that those laws are inconsistent with any provision of [FCRA]." 1970 Act § 601, 84 Stat. 1136. The 1996 Amendments added "exceptions" to this general savings clause, including an exception expressly preempting any state "requirement or prohibition * * * with respect to the exchange of information among persons affiliated by common ownership or common corporate control." 1996 Amendments § 2419(2), 110 Stat. 3009-453 (15 U.S.C. 1681t(b) and (2)).

In the Fair and Accurate Credit Transactions Act of 2003 (FACT Act), Pub. L. No. 108-159, § 711, 117 Stat.

2011, Congress made the preemption provision permanent. The FACT Act also imposed an additional restriction on the sharing of information among affiliates. Under the FACT Act, information shared among affiliates pursuant to the safe harbor in Section 1681a(d)(2)(A) cannot be used for marketing solicitations unless the affiliate (1) discloses to the consumer that the information may be used for such solicitations, and (2) gives the consumer an opportunity to opt out from such solicitations. § 214(a)(2), 117 Stat. 1980 (15 U.S.C. 1681s-3(a)).[2]

3. In 2003, California enacted the California Financial Information Privacy Act (California Act), Cal. Fin. Code §§ 4050 *et seq.* (West Supp. 2009).[3] That statute generally prohibits a financial institution from sharing a California resident's "[n]onpublic personal information"—roughly defined as personally identifiable financial information that is not public, and including transaction and experience information, *id.* § 4052(a)—with any

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[2] Congress has also addressed the issue of information-sharing about consumers in the Gramm-Leach-Bliley Act (GLBA), Pub. L. No. 106-102, Tit. V, 113 Stat. 1436 (15 U.S.C. 6801 *et seq.*). That law prohibits financial institutions from disclosing any nonpublic personal information about a consumer to any nonaffiliate without giving the consumer notice and an opportunity to opt out. 15 U.S.C. 6802. The statute has no provision comparable to FCRA's restrictions on information-sharing among affiliates, although it does require financial institutions annually to disclose to consumers their policies and practices with respect to the information they share with both affiliates and non-affiliates. 15 U.S.C. 6803(a). GLBA also provides that it does not preempt state laws that are more protective of consumers, 15 U.S.C. 6807, though it says nothing about whether such state laws might be preempted by other federal laws (such as FCRA).

[3] All citations to the California Act are to the 2009 West Supplement of the California Financial Code.

affiliate without notifying the person that it may share the information and providing the person an opportunity to opt out. *Id.* § 4053(b). The California Act permits affiliates to share information without providing notice and an opportunity to opt out, however, if the affiliates are in the same line of business and other specified requirements are met. *Id.* § 4053(c). The California Act also contains a number of other exceptions that permit financial institutions to release nonpublic personal information for specified purposes (*e.g.*, to effect transactions directed by the consumer, to protect against fraud and identity theft, to assist institutional risk control, to collect debt). *Id.* § 4056(b).

B. 1. Petitioners are banking trade groups. They filed suit in federal district court against various California state officials (respondents in this Court), seeking a declaration that FCRA preempts the California Act to the extent that the state law restricts the sharing of information among affiliates.

The district court granted summary judgment for respondents. Pet. App. 25a-40a. The court construed FCRA's preemption provision as limited to state "laws that prohibit or restrict the sharing of *consumer reports* among affiliates." *Id.* at 36a. Because transfers of information among affiliates are specifically excluded from the definition of "consumer report" pursuant to the 1996 Amendments (see 15 U.S.C. 1681a(d)(2)(A); pp. 3-4, *supra*), the court found FCRA's preemption provision to be inapplicable. See Pet. App. 35a-36a. The district court held that GLBA (see note 2, *supra*) rather than FCRA controlled the preemption inquiry, and that the California Act survived entirely intact. Pet. App. 40a.

2. The court of appeals reversed and remanded. Pet. App. 1a-13a. The court rejected the district court's

holding that, because the 1996 Amendments broadly excluded information-sharing among affiliates from the definition of "consumer report," such information-sharing lies outside FCRA's preemption provision as well. See *id.* at 9a-10a.

In defining the preemptive scope of Section 1681t(b)(2), however, the court of appeals concluded that, "as used in the affiliate-sharing preemption clause and elsewhere in the FCRA, 'information' has a restricted meaning. It does not include all information. Rather, it includes only the sort of information described in the definition of 'consumer report' in [Section] 1681a(d)(1)." Pet. App. 10a. The court therefore construed FCRA's preemption provision as limited to the sharing among affiliates of "'information,' as that term is used in [Section] 1681a(d)(1)," *id.* at 12a—*i.e.*, information whose communication *would* constitute a "consumer report" but for the affiliate-sharing exclusions contained in Section 1681a(d)(2). See *id.* at 10a-12a. The court of appeals remanded the case for the district court to "determine whether, applying this restricted meaning of 'information,' any portion of the affiliate-sharing provisions of [the California Act] survives preemption and, if so, whether it is severable from the portion that does not." *Id.* at 13a.

3. On remand, the district court held that under the court of appeals' analysis, no applications of the California Act survived preemption. In the alternative, the court held that any valid applications that might exist would be inseverable from the invalid applications. Pet. App. 45a-50a.

The court of appeals again reversed. Pet. App. 14a-24a. The court held that some communications of nonpublic personal information covered by the California

Act would fall outside FCRA's basic definition of "consumer report," and that some applications of the California Act therefore survived preemption. *Id.* at 18a-19a. The court of appeals further held that the valid applications of the state law were severable from those that were preempted. *Id.* at 19a-22a. Judge Wallace dissented on the severability issue. *Id.* at 23a-24a.

**DISCUSSION**

Although the court of appeals' construction of Section 1681t(b)(2) is unduly narrow, the question presented does not warrant this Court's review at the present time.

I. The court of appeals erred in holding that the term "information" in Section 1681t(b)(2) of FCRA's preemption provision incorporates the definition of "consumer report" contained in Section 1681a(d)(1). Within Section 1681t, Paragraph (b)(2) is by its terms an "exception[]" to Subsection (a), which generally preserves state laws governing the use of "information on consumers." The term "information" in Section 1681t(b)(2) is properly understood as a shorthand reference to the term "information on consumers." Although FCRA does not preempt the application of state law to the sharing among affiliates of non-consumer-related information, its preemptive force does extend beyond the narrower category of information encompassed by the basic definition of "consumer report."

Because the nonpublic personal information regulated by the California Act is by definition information on consumers (see Cal. Fin. Code § 4052(a)-(b)), the court of appeals should have concluded that the California Act's provisions regulating affiliates' information-sharing are preempted in their entirety. FCRA's

basic definition of "consumer report" is narrower than any reasonable understanding of the term "information on consumers," because it imposes additional limitations, including the requirement that the relevant information be "used or expected to be used or collected in whole or in part" for certain defined purposes. 15 U.S.C. 1681a(d)(1). By construing the term "information" in Section 1681t(b)(2) to incorporate those limitations, the court of appeals improperly constricted FCRA's preemptive scope.

II. The Court's review is nevertheless unwarranted at this time. The court of appeals' decision does not conflict with any decision of this Court or another court of appeals, but rather appears to be the only published appellate decision interpreting and applying Section 1681t(b)(2). And although the Ninth Circuit's decision reads Section 1681t(b)(2) too narrowly, its holding still gives the provision significant preemptive effect.

Moreover, with respect to certain information shared among affiliates, federal law imposes notice-and-opt-out requirements similar to those in the California Act. See 15 U.S.C. 1681a(d)(2)(A)(iii), 1681s-3(a)(1). Given those federal-law requirements, the incremental effect of the California Act on information-sharing among affiliates may not be substantial. And even when the California Act restricts particular information-sharing that is not regulated by federal law, affiliate groups may have developed systems that can readily be adapted to ensure compliance with the California Act. The practical impact of the court of appeals' decision is therefore uncertain. If that practical impact proves to be significant, or if other States enact laws like California's and a circuit conflict develops, this Court's review may be warranted at some future date.

## I. THE COURT OF APPEALS ERRED IN EQUATING THE TERM "INFORMATION" IN FCRA'S PREEMPTION EXCEPTION WITH THE TERM "CONSUMER REPORT" AS DEFINED IN SECTION 1681a(d)(1)

1. With an exception not relevant here, FCRA's affiliate information-sharing preemption clause provides: "No requirement or prohibition may be imposed under the laws of any State * * * with respect to the exchange of information among persons affiliated by common ownership or common corporate control." 15 U.S.C. 1681t(b) and (2). Petitioners now contend (Pet. 17-19) that the term "information" in Section 1681t(b)(2) should be given its broadest literal reading, such that the provision preempts all state-law restrictions on the sharing among affiliates of information of any sort. That is incorrect.[4]

"[S]tatutes are not read as a collection of isolated phrases," and thus "'[a] word in a statute may or may not extend to the outer limits of its definitional possibilities.'" *Abuelhawa* v. *United States*, No. 08-192 (May 26, 2009), slip op. 3 (second pair of brackets in original) (quoting *Dolan* v. *USPS*, 546 U.S. 481, 486 (2006)); see Pet. App. 9a ("We start with the premise that 'the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'") (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). That principle is particularly salient where, as here, an acontextual reading of a lone

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[4] Even petitioners previously acknowledged there must be some limitation on the term "information." See, *e.g.*, C.A. Pet. Reply Br. at 3 n.2 (Oct. 13, 2004) ("Obviously, the 'information' referred to * * * in [Section] 1681t(b)(2)'s express preemption clause is 'information on consumers.'").

paragraph would cause the statute's preemptive reach to vastly exceed even the most expansive understanding of what the statute is about. As discussed below, FCRA regulates several kinds of "information" in one way or another, but even at its broadest does not reach beyond "information on consumers." See pp. 14-15, *infra*.[5]

2. The court of appeals construed the term "information" in Section 1681t(b)(2) as limited to communications falling within the basic definition of "consumer report" contained in Section 1681a(d)(1). The court of appeals' reasoning is unsound, and its holding disserves Congress's objectives in enacting the 1996 Amendments.

The court of appeals believed that its understanding of the term "information" was consistent with the "restricted sense" of the term in the definition of "consumer report," as well as in immediately following provisions excluding communications of certain categories of information from that definition. Pet. App. 10a-11a (citing 15 U.S.C. 1681a(d)(1) and (2)). The court's reliance on those provisions was misplaced. FCRA defines the term "consumer report" as the communication of infor-

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[5] This restriction on the outer reaches of FCRA preemption was not explicit in the amicus curiae brief filed by the federal agencies in the initial appeal to the Ninth Circuit. Precise definition of the outer boundaries of FCRA preemption is not strictly necessary to decide this case, which concerns only financial institutions that desire to share information about their customers with their affiliates (see Compl. paras. 2, 6, 7, 8, 14, 27)—a field from which state regulation is excluded regardless of whether "information" means "information on consumers" or something broader. If this Court were to grant review, however, its construction of Section 1681t(b)(2) could potentially affect future cases in which the choice between those two readings would be outcome-determinative. The Court therefore may wish to have those considerations in view in deciding whether certiorari should be granted.

mation that "bear[s] on a consumer's credit worthiness" or other defined characteristics, and that "is used or expected to be used or collected" for certain enumerated purposes, such as to determine the consumer's creditworthiness. 15 U.S.C. 1681a(d)(1) (footnote omitted). This definition certainly contains several limitations, but none is implicit in the simple word "information." Far from indicating that the term "information" standing alone has a "restricted meaning" (Pet. App. 10a), Section 1681a(d)(1) assumes that the word is broad; were it not, the rest of the section would be unnecessary. Stated otherwise, the entire point of Section 1681a(d)(1) is to make clear what specific kinds of information, used for what purposes, qualify a communication as a "consumer report"; in this statutory framework, "information" is necessarily broader than "consumer report."

The court of appeals' reliance (Pet. App. 11a) on 15 U.S.C. 1681a(d)(2)(A)(ii) and (iii) is similarly misplaced. Those provisions exclude specified categories of communications from the definition of "consumer report." Nothing in those provisions logically suggests, however, that communications falling outside the scope of the exclusions do not contain "information." Once again, the use of the word "information" in those provisions does not indicate that the word takes on the meaning of the provisions as a whole, let alone the "restricted sense" of the word that the court of appeals ascribed to Section 1681a(d)(1).

The court of appeals' narrowing construction of the term "information" in Section 1681t(b)(2) also disserves an important purpose of the 1996 Amendments and of the FACT Act. *Inter alia*, Congress sought to lessen disincentives on information sharing among affiliates

by reducing uncertainty about whether particular communications to affiliates would constitute "consumer reports" (and thus potentially would transform the entities into consumer reporting agencies). See pp. 2-4, *supra*. To achieve that result, Congress broadly excluded inter-affiliate communications from the definition of "consumer report" and substituted a separate scheme for affiliate information-sharing. See pp. 3-5, *supra*; 15 U.S.C. 1681a(d)(2) and (3), 1681s-3, 1681t(b)(2). The court of appeals' decision would return financial entities to the very quandary from which this legislation tried to extricate them. By making the preemptive effect of Section 1681t(b)(2), and thus the potential legal consequences of information-sharing among affiliates, again turn on whether particular communications fall within the basic FCRA definition of "consumer report," the Ninth Circuit effectively has reversed Congress's effort to clarify the law so as to remove disincentives on affiliates' sharing of consumer information.

3. Properly understood, the term "information" in Section 1681t(b)(2) means "information on consumers," as that phrase is used in Section 1681t(a).[6] Because the California Act regulates, at its broadest, "nonpublic personal information," which is by definition a subset of information on consumers, see Cal. Fin. Code § 4052(a)-(b), FCRA preempts the California Act's affiliate-sharing provisions, *id.* § 4053(b), in their entirety.

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[6] Cf. 66 Fed. Reg. 51,510 (2001) (opinion of Office of the Comptroller of the Currency (OCC) that FCRA preempts West Virginia's Insurance Sales Consumer Protection Act, W. Va. Code §§ 33-11A-1 *et seq.* (2006)) ("The FCRA preemption provision ensures that affiliated entities may share customer information without interference from State law and subject only to the FCRA notice and opt-out requirements if applicable.").

a. Section 1681t contains a general savings clause followed by specific exceptions that expressly preempt various categories of state laws. Subsection (a) states that, "[e]xcept as provided in [Section 1681t(b)-(c)]," FCRA "does not [preempt] the laws of any State with respect to the collection, distribution, or use of any *information on consumers*, * * * except to the extent that those laws are inconsistent with any provision of [FCRA]." 15 U.S.C. 1681t(a) (emphasis added). The term "information" in the preemption exception of Paragraph (b)(2), which applies to the sharing of information among affiliated entities, is a shorthand reference to the phrase "information on consumers," as used in FCRA's general rule of non-preemption.

Construing the terms relating to "information" in the same way in the savings provision and its exceptions comports with usual rules of statutory interpretation, and produces the most natural reading of the statute. An exception should not be read to sweep more broadly than the general rule to which it is an exception. By definition, an "exception * * * exempts something which would otherwise fall within the general words of the statute." Earl T. Crawford, *The Construction of Statutes* § 91, at 128-129 (1940); see *United States* v. *Dickson*, 40 U.S. (15 Pet.) 141, 165 (1841) (Story, J.) ("[W]here the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause.").

At the same time, construing the term "information" any more *narrowly* than "information on consumers" finds no support in the text or structure of the statute.

Textually, the exception that Paragraph (b)(2) carves out of the savings clause relates to *who* shares the information, not *what* information is shared. Moreover, there is nothing in FCRA's structure that suggests a narrower reading. Although "consumer reports" are perhaps the most intricately regulated subject under FCRA, the federal law reaches beyond "consumer reports" to address "information on consumers" more broadly. See, *e.g.*, 15 U.S.C. 1681a(f) (activities of a "consumer reporting agency" include "assembling or evaluating * * * information on consumers"), 1681a(g) (defining a consumer's "file" as "all of the information on [a] consumer" held by a consumer reporting agency), 1681q (making it a crime fraudulently to obtain "information on a consumer from a consumer reporting agency"), 1681s-2(a)(1)(A) ("A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows * * * the information is inaccurate."), 1681t(a) (generally preserving state laws relating to "information on consumers"); see also *Senate Report* 18 (intent of FACT Act was to permit affiliates to "share any application information * * * and consumer reports"). If Paragraph (b)(2) is construed as limited to consumer reports, States will be allowed to regulate the sharing among affiliates of other consumer-related information that is covered by FCRA's substantive provisions, notwithstanding Congress's evident intent that, with respect to affiliates' sharing of such information, the federal scheme would be exclusive.

b. In defending the court of appeals' interpretation of the term "information" in Section 1681t(b)(2), respondents assert that "the purpose of the FCRA is to regulate consumer reporting, and not to regulate all information shared among affiliates." Br. in Opp. 13. That char-

acterization suggests a false dichotomy. In between Section 1681a(d)(1)'s definition of "consumer report" and an understanding of the term "information" that is untethered to the statute's subject matter lies the appropriate interpretation of Section 1681t(b)(2)'s preemption provision. That interpretation preempts state laws relating to the exchange among affiliated entities not of all information, and not only of "consumer reports," but instead of "information on consumers" generally.

Under that interpretation, the court of appeals erred in holding that some applications of the California Act to affiliate information-sharing survived preemption. The California Act addresses the very kind of consumer information that lies at the heart of FCRA and the FACT Act. Section 1681t(b)(2) therefore preempts all of the California Act's applications to sharing of information among affiliates.[7]

## II. THE QUESTION PRESENTED DOES NOT WARRANT THIS COURT'S REVIEW AT THIS TIME

Although the court of appeals adopted an unduly narrow reading of Section 1681t(b)(2), the court's ruling does not warrant this Court's review.

1. Many of the usual considerations favoring review in this Court are absent here. There is no present split of authority in the federal courts of appeals or state courts of last resort. Indeed, the decision below appears to be the first published appellate ruling to construe the

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[7] In cases where it is unclear whether particular state-law affiliate-sharing provisions deal with "information on consumers," it may be appropriate to consider the overall structure and purposes of FCRA in resolving that ambiguity. No such uncertainty, however, exists in this case.

preemption language at issue.[8] Nor is there any conflict between the ruling below and any decision of this Court.

The court of appeals' decision appears unlikely to cause the kind of nationwide effects that might warrant this Court's immediate review even in the absence of a circuit conflict. To be sure, any disuniformity in the application of Section 1681t(b)(2) disserves Congress's purposes in enacting and amending FCRA. Congress intended its scheme for regulating affiliates' sharing of information on consumers to serve as "the national uniform standard." *Senate Report* 55. Congress recognized that "credit reporting and credit granting are, in many aspects, national in scope, and that a single set of Federal rules promotes operational efficiency for industry, and competitive prices for consumers." *Ibid.*; see S. Rep. No. 166, 108th Cong., 1st Sess. 6 (2003) ("[T]he authors of the 1996 Amendments sought to establish uniform standards in key areas * * * includ[ing] * * * the sharing of information amongst affiliated entities."). The immediate practical effect of the court of appeals' decision, however, likely will be confined to California. The California Act applies only to a financial institution's handling of information about a consumer "whose last known mailing address * * * as shown in the records of the financial institution, is located in [California]." Cal. Fin. Code § 4052(f). And the California Act appears to permit affiliate groups to continue the common practice of commingling information about California consumers and non-California consumers in shared databases, so long as affiliates respect the California Act

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[8] In an unpublished 2002 decision, the Fourth Circuit upheld the OCC's preemption determination cited in note 6, *supra*. See *Cline* v. *Hawke*, 51 Fed. Appx. 392, cert. denied, 540 U.S. 813 (2003).

when an affiliate "further dislose[s] or use[s]" information about a California resident. See *id.* § 4053(b)(1).

Petitioners suggest that the decision below "paves the way for other [S]tates to enact laws restricting affiliate information sharing." Pet. 32. Any such laws, however, can be subjected to preemption challenges similar to the one brought here. Decisions resolving such suits may produce a circuit conflict, and they may clarify the legal issues presented and thereby assist this Court if its intervention ultimately becomes necessary. And until such laws are actually enacted, petitioners' predictions as to the likely nationwide consequences of the Ninth Circuit's decision are inherently speculative. The possibility that other States will enact restrictions similar to those at issue here provides no sound basis for this Court to depart from its usual practice of deferring review until a disputed legal issue has arisen in more than one court of appeals.

2. In addition, experience under the Ninth Circuit's decision and further attention from the courts of appeals and state supreme courts would sharpen a number of factual and legal issues in this area. For example, future cases outside the Ninth Circuit might helpfully explore the contours of the term "information on consumers." See pp. 15-16 & note 7, *supra*. In the Ninth Circuit, much will turn on how broadly respondents and federal regulators read the FCRA definition of "consumer report" (and hence how narrowly they read the non-preempted applications of the California Act). Both FCRA and the California Act are intricate, and the California Act contains a number of exceptions, see p. 21, *infra*. This Court may find actual experience under the Ninth Circuit's ruling—incorrect though it is—productive if it

enables businesses and regulators alike to better articulate the practical dimensions of the preemption issues.

3. Petitioners contend that this Court's immediate intervention is necessary to prevent far-reaching adverse consequences. Pet. 25-28, 31-32. Contrary to petitioners' assertions, the practical effect of the ruling below does not appear to be serious or certain enough to warrant this Court's immediate review.

a. Petitioners emphasize (Pet. 15) that, in an amicus brief filed in the initial appeal in this case, various federal agencies expressed the view that the question presented was "of enormous practical significance to the financial institutions that certain of the Agencies supervise." Gov't C.A. Amicus Br. 13. The question presented on the initial appeal, however, was whether the judgment of the district court, which had held that *no* applications of the California Act were preempted by Section 1681t(b)(2), should be allowed to stand. The court of appeals *reversed* that judgment, holding that FCRA preempts the California Act's application to the sharing among affiliates of information falling within FCRA's basic definition of "consumer report." Pet. App. 10a. As the case comes to this Court, the question that remains is whether the California Act is also preempted as applied to consumer-related information that lies outside the "consumer report" definition. Although the United States believes that the court of appeals resolved that question incorrectly, and that the error may ultimately have non-trivial consequences, the issue presented now is of considerably less significance than the question presented in the earlier appeal.

Section 1681a(d)(1) establishes two basic limits on the scope of consumer-related information that will constitute a "consumer report." First, the information must

"bear[] on a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." 15 U.S.C. 1681a(d)(1) (footnote omitted). Second, the information must be "used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for" credit or insurance, or for certain other specified purposes. *Ibid.* It is unclear how broad a range of consumer-related information will fail to satisfy one or both of those requirements, and therefore will be subject to the California Act's affiliate information-sharing provisions under the court of appeals' decision. Thus, the basic scope and effect of the California Act, as limited by the court of appeals, may be narrow.

b. FCRA and the FACT Act already impose notice-and-opt-out schemes—similar, though hardly identical, to the California Act's requirements—that apply when affiliates wish to share information of certain kinds, or for certain purposes. Information other than transaction and experience information is already subject to FCRA notice-and-opt-out requirements. See 15 U.S.C. 1681a(d)(2)(A)(iii). And use of transaction and experience information for marketing solicitations is subject to notice-and-opt-out requirements under the FACT Act. See 15 U.S.C. 1681s-3(a)(1). With respect to some transfers of consumer information among affiliates, the California Act's requirements may largely track those imposed by federal law. Moreover, many affiliate groups subject to the California Act already have technologies and procedures in place to provide notices and to track and respect consumers' opt-out preferences where required by federal law. Even when particular transfers of information among affiliates do not trigger the federal

notice and opt-out requirements, the existence of those technologies and procedures may facilitate compliance with the California Act.

In addition, the California Act itself exempts certain uses of information, thus narrowing the Act's potential effects. Use of information for institutional risk control, to respond to fraud or identity theft, or for debt collection is exempted from the California Act's operation. See Cal. Fin. Code § 4056(b)(3)(A), (B) and (D). And when transaction and experience information is used with the consumer's consent (either express, or implied by the consumer's own inquiry or request for a transaction), the California Act's restrictions do not apply. See *id.* § 4056(b)(1), (2) and (3)(C). Those considerations also give reason to hope that only modest efforts will be needed to comply with the California Act as limited by the Ninth Circuit.

Until regulated entities gain greater experience under the California Act, the practical impact of the state-law restrictions on affiliate information-sharing will remain uncertain. It is unclear to what extent financial institutions' existing systems can actually be adapted to comply with the California scheme. There may be affiliate groups that currently lack such systems because they have intentionally limited their information-sharing to avoid the need to give notice (or track opt-outs) under federal law. In addition, even for the many affiliate groups that already comply with federal notice-and-opt-out schemes, problems could arise (and preemption might be warranted under 15 U.S.C. 1681t(a)) if the specific forms of notice required by California officials frustrate the purpose of the federal notice by creating confusion about the rules governing information-sharing and opt-out. Compare 12 C.F.R. Pt. 41 App. C (model forms

under FCRA), with Cal. Fin. Code § 4053 Form (model form under California Act). In sum, the practical difficulty of compliance with the California Act, as limited by the Ninth Circuit, is as yet unclear.

Out of an abundance of caution and fear of substantial civil penalties (see Cal. Fin. Code § 4057), many entities may choose to comply with the California Act's affiliate information-sharing provisions even with respect to information that arguably falls within the FCRA definition of "consumer report." And even apart from that possibility, the court of appeals' holding permits the California Act to regulate some uses by affiliates of some kinds of information that Congress intended to be left unregulated. At the present time, however, the practical effects of the court of appeals' decision do not appear so far-reaching as to justify a departure from this Court's usual certiorari criteria.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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